

No. SC92344

*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

DAVID HUDSON,

Appellant.

**Appeal from the Associate Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit, Division 29
The Honorable Michael Stelzer, Judge**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

A jury found the defendant guilty of both the class A misdemeanor of domestic assault in the third degree pursuant to Section 565.074, RSMo 2000, and the class A misdemeanor of harassment pursuant to Section 565.090.1(5), RSMo Cum. Supp. 2011. The defendant filed a timely appeal, challenging the sufficiency of the evidence of his harassment conviction and the constitutionality of the harassment statute. Because this appeal involves the validity of a statute in this state, the Missouri Supreme Court has exclusive jurisdiction of the cause. Mo. Const. art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

The defendant was charged by the State of Missouri with: (1) class A misdemeanor of domestic assault in the third degree pursuant to Section 565.074, RSMo 2000, in that the defendant attempted to cause physical injury to the victim B.R. by striking her, and (2) class A misdemeanor of harassment, Section 565.090.1(5) RSMo Cum. Supp. 2011, in that the defendant knowingly made repeated unwanted communications to B.R. by sending text messages and calling her. L.F. 23, 24. The defendant was found guilty of both counts by a jury. L.F. 92, 93.

The victim, B.R., began dating the defendant in approximately June 2010. Tr. 125. After three months the defendant moved in with B.R. and her 18 month old son. Tr. 124. However, the defendant became very jealous and abusive toward B.R. Tr. 126. On one occasion the defendant shoved B.R. into shrubs, pulled off her shirt and her bra, and strangled her. Tr. 129. On September 14, 2010, the defendant was arguing with B.R., and in an attempt to defuse the situation B.R. took her young son and left the house. Tr. 126. After 30 minutes B.R. returned to the house with her son, but the defendant became angrier and angrier. Tr. 126. The defendant shoved the back of B.R.'s head into the hallway wall, causing her baby's head to hit the wall as well. Tr. 127. B.R. jumped up, grabbed her baby, ran

out the front door, and called police. Tr. 127. Because of the abuse, B.R. ended her relationship with the defendant. Tr. 125-26, 130.

Despite ending the relationship, the defendant was constantly texting B.R. Tr. 130. In the messages the defendant called B.R. a bitch, and he told her that she would die soon because he had HIV. Tr. 157. The defendant also called B.R. repeatedly, and she would not answer his calls or text messages. Tr. 132, 141. B.R. absolutely did not want the defendant contacting her. Tr. 130. Between October 15 and 17, 2010, B.R. called the police three times to report the harassing messages. Tr. 130. Frightened and scared, B.R. told Officers Stevens and Vance she was afraid the defendant was going to harm her and that she was concerned for her safety. Tr. 141, 159. On October 21, 2010, the defendant admitted to Detective Strittmatter that he had been texting B.R. Tr. 163.

A jury found the defendant guilty of both domestic assault in the third degree and harassment. Tr. 182. The defendant was sentenced to one year in jail on each count to be served concurrently. L.F. 112. The defendant now appeals. L.F. 113.

POINTS RELIED ON

I - The trial court correctly overruled the defendant's motion for judgment of acquittal at the close of all evidence, in entering judgment on the jury's verdict of the crime of harassment, violating Section 565.090, RSMo. Cum. Supp. 2011, because the State presented sufficient evidence or evidence from which reasonable inferences could be drawn that the defendant was aware his communications with B.R. between October 15 and 17, 2010 were unwanted when he called her a bitch and told she would die after physically assaulting her.

Section 565.090(5), RSMo. Cum. Supp. 2011

S.A. v. Miller, 248 S.W.3d 96 (Mo. App. W.D. 2008)

State v. Reed, 181 S.W.3d 567 (Mo. banc 2006)

U.S. Const. Amend. V, XIV

Mo. Const. art. I, § 10

II – Section 565.090.1(5), RSMo. Cum. Supp. 2011, making “repeated unwanted communications to another person” harassment is neither overbroad nor void for vagueness under the First Amendment to the United States Constitution or Article 1, § 8 of the Missouri Constitution because its terms are both objective and sufficiently clear to give adequate notice of what is proscribed and it ensures the legitimate right of citizens to avoid unwelcome speech.

Section 565.090(5), RSMo. Cum. Supp. 2011

Hill v. Colorado, 530 U.S. 703 (2000)

State v. Blair, 175 S.W.3d 197 (Mo. App. E.D. 2005)

Rule 24.04(b)(2)

U.S. Const. Amend. I, V, XIV

Mo. Const. art. I, §§ 8 and 10

ARGUMENT

I - The trial court correctly overruled the defendant's motion for judgment of acquittal at the close of all evidence, in entering judgment on the jury's verdict of the crime of harassment, violating Section 565.090, RSMo. Cum. Supp. 2011, because the State presented sufficient evidence or evidence from which reasonable inferences could be drawn that the defendant was aware his communications with B.R. between October 15 and 17, 2010 were unwanted when he called her a bitch and told she would die after physically assaulting her.

Preservation. The trial court denied the defendant's motion for judgment of acquittal made at the close of the evidence because the Court found that there was sufficient evidence to support the verdict. Tr. 167; L.F. 95. The defendant challenged the sufficiency of the evidence in his motion for new trial, therefore the issue is preserved for appellate review. Rule 29.11(d); L.F. 109.

Standard of Review. When judging the sufficiency of the evidence to support a conviction, the Supreme Court may not weigh the evidence but accept as true all evidence tending to prove guilt together with reasonable inferences that support the verdict, and ignore all contrary evidence and inferences. *State v. Latall*, 271 S.W.3d 561, 566 (Mo. banc 2008). In

determining whether the evidence was sufficient to support a conviction, this Court asks only whether there was sufficient evidence from which the trier of fact could reasonably have found the defendant guilty. *Id.* This Court accepts all evidence, direct and circumstantial, and all reasonable inferences supportive of the judgment, disregarding the contrary evidence. *State v. Reed*, 181 S.W.3d 567, 569 (Mo. banc 2006).

Discussion. The defendant was charged and found guilty by a jury of harassment. L.F. 24; Tr. 182. A person violates Section 565.090, RSMo. Cum. Supp. 2011, and commits the crime of harassment when he

- (1) Knowingly communicates a threat to commit any felony to another person and in so doing frightens, intimidates, or causes emotional stress to such other person; or
- (2) When communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm; or
- (3) Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication; or

- (4) Knowingly communicates with another person who is, or who purports to be, seventeen years of age or younger and in so doing and without good cause recklessly frightens, intimidates, or causes emotional distress to such other person; or
- (5) Knowingly makes repeated unwanted communication to another person; or
- (6) Without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated, or emotionally distressed, and such person's response to the act is one of a person of average sensibilities considering the age of such person.

§ 565.090.1.

The defendant was charged under subsection (5) because he “knowingly made repeated unwanted communication to B.R. by sending text messages and calling her.” L.F. 24. Thus, in finding the defendant guilty of harassment, the jury was presented with evidence that the defendant: (1) knowingly; (2) made repeated unwanted communication; (3) to another person, B.R. L.F. 88.

On appeal, the defendant claims that the State failed to present sufficient evidence that he was aware his contact with B.R. was unwanted.

However, the evidence presented to the jury clearly supports a finding that the defendant was aware that B.R. did not want him to contact her. The defendant physically assaulted B.R. on multiple occasions, and the assault on September 14, 2010 ended their relationship. Tr. 126-30. The defendant proceeded to text B.R. without B.R. responding, including that she was a bitch and that she would die. Tr. 157. B.R. was so frightened she contacted the police three times in 48 hours. Tr. 130. The jury inferred from the circumstances, and was free to do so, that the defendant was aware that B.R. did not want him to contact her. *See Reed*, 181 S.W.3d at 569 (the Court accepts all reasonable inferences supported by the judgment); *State v. Grim*, 854 S.W.2d 403, 411(Mo. banc 1993) (the Court grants the State all reasonable inferences from the evidence).

Moreover, a victim is not required to tell the defendant his contact is unwanted in order to support a jury's finding that the defendant was aware that the victim did not want him to contact her. *S.A. v. Miller*, 248 S.W.3d 96, 100 (Mo. App. W.D. 2008). A plain reading of the statute does not require the victim to tell the defendant his communication is unwanted, and Missouri case law and public policy does not support the defendant's proposition that would place such a duty on the victim. In *Miller*, the Court found that Miller purposely and repeatedly engaged in an unwanted course

of conduct to support a finding for stalking even though S.A. never told him that he was bothering her. *Id.* at 99-100. The trial court was free to infer from the evidence that the defendant was aware S.A. did not want him following or staring at her when she avoided his contact. *Id.* Similarly here, the jury was free to infer from the circumstances that the defendant was fully aware B.R. did not want him to contact her when she ignored his calls and threatening text messages. Therefore, a reasonable juror could find beyond a reasonable doubt that the defendant had knowledge his communication was unwanted, and thus support a finding he was guilty of harassment.

Because the evidence clearly supports a finding the defendant was aware his communication to B.R. was unwanted, the conviction does not violate the defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Missouri Constitution. The State respectfully requests this Court uphold the defendant's conviction.

II – Section 565.090.1(5), RSMo. Cum. Supp. 2011, making “repeated unwanted communications to another person” harassment is neither overbroad nor void for vagueness under the First Amendment to the United States Constitution or Article 1, § 8 of the Missouri Constitution because it ensures the legitimate right of citizens to avoid unwelcome speech and its terms are both objective and sufficiently clear to give adequate notice of what is proscribed.

Preservation. To properly raise a constitutional issue, a party must: (1) raise the question at the first available opportunity; (2) specifically designate the constitutional provision alleged to have been violated, such as by explicit reference to the article and section, or by quotation from the particular provision; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout the proceeding for appellate review. *State v. Blair*, 175 S.W.3d 197, 199 (Mo. App. E.D. 2005); Rule 24.04(b)(2). “Additionally, a constitutional challenge to a statute must not only have been presented to the trial court, but the trial court must have ruled thereon.” *Mo. Prosecuting Attorneys Ret. Sys. v. Pemiscot County*, 217 S.W.3d 393, 400 (Mo. App. S.D. 2007); *Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008) (“an attack on the constitutionality of a statute is a

matter of such dignity and importance that the issues should be fully developed at trial and not as an afterthought on appeal”).

The defendant did not challenge this statute on constitutional grounds at any point throughout the trial; therefore, it is not preserved for review. *Blair*, 175 S.W.3d at 199 (citing *State v. Belcher*, 805 S.W.2d 245, 251 (Mo. App. S.D. 1991) (when a constitutional issue is raised for the first time in a motion for a new trial, it is not preserved for review); *State v. Gonzales*, 253 S.W.3d 86, 88 (Mo. App. E.D. 2008); *but see State v. Molsbee*, 316 S.W.3d 549, 554 (Mo. App. W.D. 2010) (the “change of law” principle may serve as an exception to the rule that constitutional issues are waived if not timely raised).

However, the Supreme Court of Missouri will decide the constitutionality of Section 565.090.1(5) in a pending case. *State v. Danny Vaughn* (SC91670) (argued and submitted on December 13, 2011). If the provision is found to be constitutional in the *Vaughn* case because it protects the legitimate rights of citizens to be free from unwanted communication, and it does so in objective terms that give adequate notice of what is proscribed, then this Court must uphold the defendant’s conviction.

Standard of Review. The party challenging the validity of the statute has the burden of proving that the act clearly and undoubtedly

violates constitutional limitations. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *State v. Pribble*, 285 S.W.3d 310, 313 (Mo. banc 2009). Any doubt about the constitutionality of a statute will be resolved in favor of the statute's validity. *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992).

Discussion. The entirety of § 565.090.1 is detailed in Respondent's first point, which outlines the various ways a defendant commits the crime of harassment. Subpart (5), for which the defendant in this case was charged and found guilty, states that a person commits the crime of harassment if he "knowingly makes repeated unwanted communication to another person." § 565.090.1(5).

The United States Supreme Court recognizes a privacy interest in avoiding unwanted communication. *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Although a criminal statute is examined with more care under the First Amendment, *State v. Carpenter*, 736 S.W.2d 406 (Mo. banc 1987), an individual's interest in avoiding unwanted communication has been repeatedly identified in many Supreme Court cases, and the right to avoid unwelcome speech can be protected in confrontational settings. *Hill*, 530

U.S. at 716. An overbroad statute implicates the First Amendment where it involves constitutionally protected speech. *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). However, while the freedom to communicate is substantial, the right of every person ‘to be let alone’ must be placed in the scales with the right of others to communicate. *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 736 (1970).

Because the statute at issue here protects the recognized privacy right of Missouri citizens specifically to be free of “unwanted communication,” the statute is not overbroad because it does not proscribe constitutionally protected speech. The Legislature limited Section 565.090.1(5) in important ways to ensure that it did not proscribe speech that is protected under the First Amendment, and the language of the statute is sufficiently clear in order to give notice of what conduct is proscribed. First, the communication must be “repeated” by the actor before it falls within the purview of the statute; a plain and ordinary meaning of the word “repeated” requires that the communication recur again and again. MERRIAM-WEBSTER’S DICTIONARY (12th ed. 2010). Additionally, the communication must be made “to another person.” This limitation that the act is targeted at a particular person like the victim B.R. in this case excludes speech that might otherwise be protected under the First Amendment. Lastly, the statute

requires that the actor must also have the knowledge that his communication is not wanted by the listener. There is no constitutional right to harass an unwilling participant, therefore Section 565.090.1(5) is valid and the defendant's conviction must be upheld. *State v. Koetting*, 616 S.W.2d 822, 826 (Mo. banc 1981); *see also Rowan*, 397 U.S. at 738 ("no one has a right to press even 'good' ideas on an unwilling recipient").

Moreover, Section 565.090.1(5) is not unconstitutionally vague because it provides adequate notice of what is proscribed. A statute that gives a person of ordinary intelligence fair notice that his contemplated conduct is forbidden is not unconstitutionally vague. *State v. Allen*, 905 S.W.2d 874, 877 (Mo. banc 1995); *U.S. v. Harriss*, 347 U.S. 612, 617 (1954). The defendant claims that individuals would be unable to consistently conform their conduct to the law because many communications in their lives might be "unwanted" and fall under Section 565.090.1(5). However, this misrepresents the narrow application of the statute; the statute still requires that the individual not only communicate with a particular person and communicate again and again, but he must also know that his communication is unwanted. In the case at hand, a person of ordinary intelligence like the defendant would have fair notice that repeatedly calling

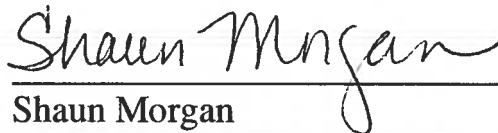
B.R., texting her that she is a bitch, and threatening that she will die is proscribed conduct that is prohibited by law.

The language making “repeated unwanted communications to another person” in Section 565.090.1(5), RSMo Cum. Supp. 2011 a crime of harassment is neither unconstitutionally overbroad nor void for vagueness. Instead, it protects a citizen’s protected right to avoid unwelcome speech, and it does not violate the First, Fifth, and Fourteenth Amendments to the U.S. Constitution and Article 1, sections 8 and 10 of the Missouri Constitution. Therefore, the State respectfully requests this Court uphold the defendant’s conviction.

CONCLUSION

For the reasons stated in Points I and II of this brief, Respondent asks this court to uphold the defendant's conviction for the class A misdemeanor of harassment.

Respectfully submitted,

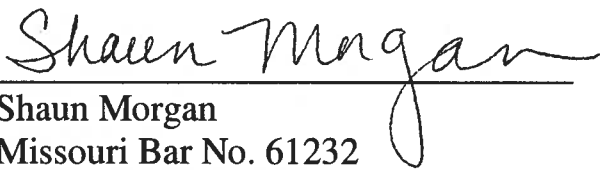
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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on March 15, 2012, a true and correct copy of the foregoing brief was hand-delivered to the Office of the State Public Defender, 1010 Market Street, Suite 1100, St. Louis, Missouri 63101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, Times New Roman 14 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word processing software identified that the brief contains 2,966 words, excluding the cover, certification, Table of Contents, and Table of Authorities. Finally, I hereby certify that copies of this brief sent by electronic mail pursuant to Local Rule 363 have been electronically scanned for viruses and found to be virus free.


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